SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1606~~ 70-128

MARTIN DIES, ET AL., *Appellants*

v.

VAN PHILLIP CARTER, ET AL., *Appellees*

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

Motion To Dismiss or Affirm

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Motion To Dismiss or Affirm

The Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the District Court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. See *Carter v. Dies*, 321 F. Supp. 1358.

STATEMENT

This is a direct appeal from the final judgment entered upon December 21, 1970, by a District Court of three judges convened on April 3, 1970, in accordance with 28 U.S.C. 2281, holding that a filing fee violates the First Amendment and the due process and the equal protection clauses of the Fourteenth Amendment when it is used as a revenue collecting device or when made an absolute qualification in order for a candidate to get his name on the ballot.

ARGUMENT

The case presents no substantial question not previously decided by the Court.

I.

In their first point on appeal, the Appellants maintain that "the court below was in error in making . . . an extension of . . . voting right principles to this new area . . .". *Jurisdictional Statement*, page 8.

But over thirty years ago, in *United States v. Classic*, 1940, 313 U.S. 299, the United States Supreme Court held: "The voter cannot be deprived of his freedom of expressing his will at a general election by a restriction on the candidate by the legislature . . . at a primary . . .".

The supporters of George Wallace, third-party candidate for President in 1968, were successful in getting their candidate's name on the ballot in Ohio only by going to court. "The unreasonable exclusion of a candidate for public office, when other candidates are given places on the ballot," the United States Supreme Court said, "denies the voters who might wish to vote for the excluded candidate the equal protection of the laws." *Williams v. Rhodes*, 1968, 393 U.S. 23.

A qualified voter as well as a candidate applied to enjoin the collection of filing fees in the landmark case of *Jenness v. Little*, 1969, 306 F. Supp. 925, 927, appeal dismissed, 1970, 90 S. Ct. 820. "The right to run," the Court said in that case, "may be an analogue of the right to vote. Moreover, since an adjudication

of the rights of plaintiff Matthews will determine substantially all of the issues in the case in any event, the Court will allow both interventions . . .".

It has been repeatedly held by federal courts that: "To prohibit candidates from getting on the ballot solely because they cannot post a certain amount of money is unconstitutional." *Jenness v. Little, supra; Matthews v. Little*, 1969, 396 U.S. 1223, 24 L. Ed 2d 45; *Fowler v. Adams*, 1970, 315 F. Supp. 592, 27 L. Ed 2d 23; *Georgia Socialist Workers Party v. Fortson*, 1970, 315 F. Supp. 1035; and *Thomas v. Mims*, 1970, 317 F. Supp. 179, 39 L.W. 2165.

In *Stapleton v. Clerk for City of Inkster*, 1970, 311 F. Supp. 1187, the following language appears: "It seems clear to this court that a restriction upon who may be a candidate necessarily affects the efficacy of a person's vote. The effectiveness of the franchise can just as certainly be curtailed by restricting the group from whom candidates may be drawn as by restricting those entitled to cast a vote or by malapportioning a legislative body."

An interesting Texas case is *Gonzalez v. City of Sinton*, 1970, 319 F. Supp. 189, where Judge Seals had this to say: "Equal protection requires that non-property owners right to vote include right to vote for non-property owner." Then the judge added: "(M)any of those same principles which render the voting restrictions constitutionally unacceptable are equally applicable to the issue of candidacy."

A recent case in point is *Turner v. Fouche*, 1970,

396 U.S. 346, 24 L. Ed 2d 567, where the Supreme Court said: "A state may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guaranties."

Another significant case which has been recently decided is *Socialist Workers Party v. Rockefeller*, 1970, 314 F. Supp. 984, 989, affirmed 91 S. Ct. 65, where the Court had this to say: "The power of the State to, in effect, limit the number of candidates placed on the ballot may not be exercised in a way that violates specific provisions of the Constitution. The right to vote freely for the candidate of one's choice, which manifestly encompasses the right of the candidate to a position on the ballot, lies at the essence of democratic society and 'any restrictions on that right strike at the heart of representative government.' *Reynolds v. Sims*, 377 U.S. 533, 555, 1964."

II.

In their second point, the Appellants, relying upon *Snowden v. Hughes*, 1943, 321 U.S. 1, have taken the position that the court below should have used the "rational relationship" test instead of the "compelling interest" test in evaluating the challenged statutes.

But *Snowden* has no application to First Amendment claims. Mr. Justice Brannon, in *N.A.A.C.P. v. Button*, 1963, 371 U.S. 415, wrote: "The decisions of this court have consistently held that only a compelling state interest within the State's constitutional power

to regulate can justify limiting First Amendment freedoms."

And Mr. Justice Marshall, in *Hall v. Beals*, 1969, 396 U.S. 45, 24 L. Ed 2d 214, 220, took pains to point out that a *per curiam* affirmance of a 1965 case had not committed the Supreme Court to the "rational relationship" test. "(I)f it was not clear in 1965 it is clear now that once a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon a showing of a compelling interest, and even then when the exclusion is the least restrictive method of achieving the desired purpose."

It would thus appear that *Snowden* is no longer controlling in Fourteenth Amendment cases involving state restrictions on the right to vote. Here, as well as in First Amendment cases, the "compelling interest" test is used. *Kramer v. Union Free School District*, 1969, 395 U.S. 621; *Cipriano v. City of Houma*, 1969, 395 U.S. 701; and *City of Phoenix v. Kolodziejski*, 1970, 26 L. Ed 2d 523.

III.

In their third and final point, the Appellants have attempted to meet the "very heavy burden of justification," *Loving v. Virginia*, 1967, 388 U.S. 1, and *Baird v. Arizona*, 1971, 27 L. Ed. 2d 639, in connection with a revenue tax ("party assesment," Art. 13.08, *Texas Election Code*) amounting to $6,300.00 and a regulatory license fee ("deposit to accompany application for place on ballot," Art. 13.07a, *Texas*

Election Code) of $50.00, both required of candidates for the office of County Judge in the 1970 Tarrant County Democratic Primary Election as a precondition to access to the ballot.

A. The Revenue Tax

"These filing fees," the Appellants explain on page 21 of their *Jurisdictional Statement*, "help support the parties and are the only method provided for defraying the expenses of holding the party primaries . . .".

It is undisputed that the filing fee, as well as the party assessment, is a tax. *Campbell v. Davenport*, 1966, 5 Cir., 362 F. 2d 624.

The discretion of the State Legislature as to taxation is restrained only by the will of the people expressed in the State Constitution. *Lane County v. Oregon*, 1868, 74 U.S. 71. And to any extent not prohibited by the Constitution of the United States. *Hagar v. Reclamation District*, 1883, 111 U.S. 701. The doctrine of legislative absolutism is foreign to free government as it exists in this country. *Taylor v. Beckham*, 1899, 178 U.S. 548, 609.

The qualifications for the office of County Judge are set forth in the Texas Constitution, Art. 5, Sec. 15, without any reference to the payment of a revenue tax or license fee, which the legislature has attempted to add as a statutory requirement for a constitutional office. But, in the case of *Burroughs & Knight v. Lyles*, 1944, 142 Tex. 704, 181 S.W. 2d 570, the Texas

Supreme Court held: "The State Constitution . . . , having prescribed the qualifications, . . . it is beyond the legislative power to change or add to those qualifications unless such right is expressly granted by the Constitution itself." To the same effect, see: *Stensoff v. State*, 1891, Tex. Sup. Ct., 80 Tex. 428, 15 S.W. 1100 and *Dickson v. Strickland*, 1924, Tex. Sup. Ct., 265 S.W. 1012; *State v. Court of Civil Appeals*, 1934, Tex. Sup. Ct., 123 Tex. 549, 75 S.W. 2d 253. Also, see: *Graham Purcell v. Jim Lindsey*, 1958, Tex. Sup. Ct., 158 Tex. 541, 314 S.W. 2d 283.

Art. 13.08, *Texas Election Code*, authorizing party assessments is unconstitutional on its face, because there is no statutory provision for notice, hearing, or appeal; and the invidious consequences of this *in camera* procedure (See *Briscoe v. Kusper*, 1970, 435 F. 2d 1046, 1971, 39 L.W. 2386) were exacerbated in Tarrant County in 1970 by the usurpation of the judicial function of the designated elected committee of the political party by a "clandestine, illegal committee of intruders," which escalated the filing fees to such an unreasonable extent that only 2 incumbent county officials, out of 25 on the ballot, had opponents, with some assessments reaching $8,900.00 and some rebates exceeding $5,000.00 after all election expenses had been paid!

As Mr. Justice Miller said, in *Savings & Loan Association v. Topeka*, 1873, 20 Wall (87 U.S.) 655, 663: "Of all the powers conferred upon government that of taxation is most liable to abuse . . . . This power can . . . readily be employed against one class of indi-

viduals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."

The Supreme Court is well aware of "The sly and stealthy arts to which state Legislatures are exposed, and the greedy appetites of adventurers, for monopolies and immunities from the state right of government." *State Bank v. Knoop*, 1853, 16 How. (57 U.S.), 369, 412.

"Unfortunately it is true," said Mr. Justice Black in *Tenney v. Brandhove*, 1950, 341 U.S. 367, 380, "that legislative assemblies, born to defend the liberty of the people, have at times violated their sacred trusts and become the instruments of oppression."

The State of Texas is notorious for its disregard and even defiance of the Constitution of the United States. A partial catalogue of recent federal decisions discloses: racist primaries financed by party assessments, *Nixon v. Herndon*, 1927, 273 U.S. 536; *Nixon v. Condon*, 1932, 286 U.S. 73; *Grovey v. Townsend*, 1935, 295 U.S. 45; *Smith v. Allwright*, 1944, 321 U.S. 649; *Terry v. Adams*, 1953, 345 U.S. 461 (See opinion of Mr. Justice Black); a poll tax embedded in the State Constitution "to disenfranchise the Negro and the poor white supporters of the Populist Party," *United States v. Texas*, 1966, 252 F. Supp. 234, 245, affirmed 384 U.S. 155; annual registration, "a direct descendant of the poll tax," disenfranchising "over one million Texans," *Beare v. Smith*, 1971, 39 L.W. 2388; malapportionment of the Legislature, *Kilgarlin*

v. Hill, 1967, 252 Fed. Supp. 404, 386 U.S. 120; statutory prohibition against assisting voters with bodily infirmities, *Garza v. Smith*, 1970, 320 F. Supp. 131; statutory plebiscite to determine whether a community is going to follow the Constitution of the United States, 1963, *Potts v. Flax*, 313 F. 2d 284; and overreaching taxes and fines, *United States v. Texas*, *supra*, and *Tate v. Short*, 1971, 39 L.W. 4301.

In this case, the State of Texas is leaning on a broken reed. *Isaiah 36:6*. The State's basic defense is *res judicata*, *United States v. Southern Ute Tribe of Indians*, 1971, 39 L.W. 4477, by reason of a judgment entered by the Supreme Court of Texas, in the case of *Waples, et al. v. Marrast*, 1916, 108 Tex. 5, 184 S.W. 180, to which the Democratic State Executive Committee was a party, even as the committee is a party to this lawsuit. The highest court of the State ruled in that case that: "The payment of the expenses of primary elections of political parties is not a public purpose for which public revenues may be used." And that construction of the State Constitution is binding upon both the three-judge court and the Supreme Court. *Saltonstall v. Saltonstall*, 1927, 276 U.S. 260, 270. See also: *Baggett v. Bullitt*, 1963, 377 U.S. 360, 375; *Kingsley International Pictures Corp. v. Regents of the University*, 1958, 360 U.S. 684, 688; and *Terminiello v. Chicago*, 1948, 337 U.S. 1, 5-6.

Moreover, it has long been established that "(a) state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock v. Pennsylvania*, 1943, 319 U.S. 105, 113. See also:

Grosjean v. American Press Co., 1936, 297 U.S. 233; *Lovell v. City of Griffin*, 1937, 303 U.S. 444; *Frost & Frost Trucking Co. v. Railroad Commission of California*, 1925, 271 U.S. 583; *Harman v. Forssenius*, 1965, 380 U.S. 528, 540; *Harper v. Virginia State Board of Elections*, 1966, 383 U.S. 663; *United States v. Texas, supra.*

The burden on the State Treasury does not justify an enactment with an invalid purpose. *Edwards v. California*, 1941, 314 U.S. 160; *Griffin v. Illinois*, 1956, 351 U.S. 12; *Shapiro v. Thompson*, 1968, 394 U.S. 618; and *Vaughn v. Bower*, 1970, 313 F. Supp. 37, affirmed 39 L.W. 3199. Especially where the statute is more effective in producing constitutional problems than revenue, *Tate v. Short, supra*, and alternatives are available, *Tate v. Short, supra; United States v. Texas, supra; Boddie v. Connecticut*, 1971, 39 L.W. 4294.

As the three-judge court said in *United States v. Texas, supra*, p. 253: "The permissible state policy here is not the perpetuation of a head tax as such, but the raising of revenue. When viewed in this perspective, it is clear that the . . . tax as a restriction on the right to vote is not "necessary" to insure the collection of revenue."

The trial court has ruled that a filing fee is unconstitutional "when it is used as a revenue collecting device," and we think this judgment should be affirmed.

B. The License Fee

The Appellants have attempted to justify the $50.00 deposit, as well as the party assessment, on the theory that it is necessary not only for revenue purposes but also to "regulate" the size of the ballot by restricting access to "serious candidates."

Our system of democratic government is founded on the elective franchise; and, as the court said, in *United States v. Slater*, D, Texas, 1881, 6 F. Rep. 824: "The Legislature cannot enlarge it or restrict it and can only regulate it so far as their authority is expressly or by necessary implication given in the constitution."

In a recent Texas three-judge case, *Garza v. Smith*, *supra*, pp. 137-138, the court made the following finding: "(T)he Texas Constitution limits the state legislature's power to regulate elections to that legislation necessary "to detect and punish fraud and preserve the purity of the ballot box" and to protect the exercise of free suffrage from "all undue influence . . . (by) power, bribery, tumult, or other improper practice." The State of Texas was a party to this lawsuit and is bound by the Court's construction of the State Constitution. Under this ruling there is certainly no constitutional grant of authority to the State Legislature to impose either a filing fee or party assessment for regulatory purposes.

The Appellants urge Art. 6, Sec. 4, of the Texas Constitution as the necessary authority for the statute requiring the filing fee and party assessment; but

United States v. Texas, supra, p. 251, rejected this provision as a justification of the poll tax. "Purification and protection of the ballot," the court said in that case, "may be accomplished by other means as the State of Texas has recognized by the passage of numerous provisions."

Two other three-judge Texas courts have recently been called upon to pass judgment upon the same provision of the Texas Constitution. In *Beare v. Smith, supra,* the Court held that this section did not justify an annual registration system for voters; the court dismissed the purification claim as "one that cannot be accepted," and held that "other effective safeguards against fraud must exist." In *Garza v. Smith, supra,* the court said that the difficulty with the fraud and undue influence argument in that case was that "it is not supported by the evidence before us." And neither is there any evidence before the Supreme Court in the case at bar of the necessity for limiting the ballot to "serious candidates" by eliminating "frivolous candidates" or "nuisance candidates."

Mr. Justice Harlan, in *Williams v. Rhodes, supra,* has stated: "The fear of frivolous candidates and the bed sheet ballot is shown to be meretricious by the history of Ohio elections prior to 1952." See also *Socialist Labor Party v. Rhodes,* 1970, 318 F. Supp. 1262; and *Chavis v. Whitcomb,* 1969, 305 F. Supp. 1364, 1390.

Assuming, without conceding the constitutional legitimacy of such an objective, due process nevertheless

requires that the state accomplish that end narrowly and fairly. See: *Williams v. Rhodes, supra*, at pp. 32-33; *Shelton v. Tucker*, 1960, 372 U.S. 539, 545; *Staub v. City of Baxley*, 1957, 355 U.S. 313, 322-325; *Bond v. Floyd*, 1966, 385 U.S. 116.

As Mr. Justice Marshall said, in *Hall v. Beals, supra*, the limitation may be justified "only when the exclusion is the least restrictive method of achieving the desired purpose."

"The power to regulate implies the existence, and not the destruction of the thing to be controlled," the Supreme Court has held. *Grand T. W. Railway v. South Bend*, 1912, 227 U.S. 544, 555.

But in Tarrant County, Texas, the incumbent office holders have "regulated" themselves out of opposition to such an extent that 77% of all filing fee money received by the County Democratic Chairman in 1970 came from incumbents. It would thus appear that the Texas statutes are designed to keep the rich out of the County Jail, *Tate v. Short, supra*, and the poor out of the County Court House.

The trial court has ruled that a filing fee is unconstitutional "when made an absolute requirement in order for a candidate to get his name on the ballot." Then the court goes on to suggest a pauper's affidavit or nominating petition as possible alternatives to the filing fee.

Incumbent office-holders, who have been accustomed to buying their offices with high filing fees, like seats on the New York Stock Exchange, have threatened

to take out display ads in the newspapers with photostatic reproductions of the pauper's affidavit of any indigent who dares to announce against them. Dr. J. D. Tomme, one of the Appellants, who stands to lose a 5% commission on filing fees handled as County Democratic Chairman, has advised a group of county officials as follows: "The stigma of a pauper's oath would make some pretty good campaign material." *Fort Worth Star-Telegram*, April 9, 1971.

The pauper's affidavit as an alternative would thus become an even more invidious form of discrimination than the filing fee, for it would exchange insult for injury. As Mr. Justice Jackson said, in *Edwards v. California*, *supra*, "It would permit those who were stigmatized by a state as . . . paupers . . . to be relegated to an inferior class of citizenship. It would prevent a citizen from seeking new horizons . . . . It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity."

Although a nominating petition may not be the least restrictive method of restricting ballot access "to a relatively small number of candidates who have demonstrated initiative and at least a minimal appeal to eligible voters," *Briscoe v. Kusper*, *supra*, p. 1054, certainly it would be a less restrictive method than the payment of filing fees.

According to the finding of the District Court, 32 States out of the 50 have filing fees. But 49 States make use of nominating petitions, *Williams v. Rhodes*, *supra*, with the breakdown of signature requirements,

according to *Georgia Socialist Workers Party v. Fortson, supra*, being as follows: de minimus to 0.1%—16 states, 0.1 to 1%—26 states, 1.1% to 3%—3 states, and 3.1% to 5%—4 states. See also: *Socialist Labor Party v. Rhodes, supra*, p. 1268; *Jackson v. Ogilvie*, 1971, 39 L.W. 2456, 2457, L.W. 3362; and *Socialist Workers Party v. Rockefeller, supra*.

The Secretary of State, who is a party to this lawsuit, has recommended to the Texas Legislature that a "unitary primary" be adopted as a substitute for the separate party primaries. Nominating petitions are already required of non-partisan or independent candidates, Art. 13.50 and Art. 13.53, *Texas Election Code*, and this requirement could very easily be extended to party candidates in a unitary primary, if there is any compelling necessity to restrict access to the ballot.

The dictum in the lower court's decision regarding "reasonable fees" has encouraged incumbent office holders in Texas to bring pressure on the State Legislature, which is presently in session, to enact a new set of filing fees amounting to 20% of the annual salary of the office. *Fort Worth Star-Telegram*, April 9, 1971.

The three-judge court, in *Campbell v. Davenport, supra*, a case involving the very filing fee statutes here under attack had this to say about the Texas filing fees: "A fee of $100 or even $500 might be explainable primarily in terms of regulation. But it strains our imagination to accept the commissioner's

argument that an assessment of some $2,000 is primarily for purposes of regulation. The most reasonable explanation of the size of this assessment is to raise revenue to cover the cost of the primary. This conclusion is borne out by the fact that the extra funds collected must be refunded. Certainly this assessment cannot be rationalized as a deterrent to the nuisance candidate."

The Texas Supreme Court has distinguished between "maintenance" and "regulation" of primary elections, *Waples, et al. v. Marrast, supra*, holding that under the State Constitution a "revenue tax" to finance the former is invalid, while a "license fee" to finance the latter is valid, *Hoeffling v. City of San Antonio*, 1892, 85 Tex., 20 S.W. 85, 87, ". . . but it must be such a fee only as will legitimately assist in the regulation, and it should not exceed the necessary or probable expense of issuing the license and inspecting and regulating the business which it covers."

Although the Texas Constitution may permit a reasonable fee to cover the actual cost of regulation, many recent federal cases have held that cost recoupment is not a legitimate justification for statutory restriction of a fundamental constitutional right.

In *Valenciano v. Bateman*, 1971, 39 L.W. 2523, the court, citing *Shapiro v. Thompson*, 1969, 394 U.S. 618, held that Arizona could not restrict county medical care to those indigents who had lived in the county a certain period of time, to preserve the fiscal integrity of its programs.

"The ability to pay is not a legitimate criterion for the state to employ," the court said in *Hull v. Petrille*, 1971, CA 2, 39 L.W. 2568, striking down a license fee for newspapers.

In Re Smith, 1971, 39 L.W. 2487, holds that a state may not bar access to bankruptcy court to an indigent unable to pay the statutory filing fee of $50.00.

Mr. Justice Brennan, in *Tate v. Short, supra*, wrote: "Since Texas has legislated a 'fines only' policy for traffic offenses, that statutory ceiling cannot . . . limit the payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent without the means to pay his fine."

In *Boddie v. Connecticut, supra*, the United States Supreme Court held that a state may not bar access to divorce court to an indigent unable to pay the statutory filing fee of $45.00. "Other alternatives exist to fees and cost requirements," the court said. "(T)he state's asserted interest in its fee and cost requirement as a mechanism of resource allocation or cost recoupment . . . was offered and rejected in *Griffin v. Illinois*, 351 U.S. 12(1956)."

The three-judge court below has ruled that a $50.00 filing fee, whether for revenue or regulation, is invalid under the Federal Constitution. The court, by dictum, speculates that a "reasonable fee" may be permissible if it should be decided at a later date that the State has a "compelling interest" in regulating the ballot; "but the dimensions of reasonableness within which the State may safely impose a fee," the court said,

"are indeed low and narrow."

There is no formula for the determination of reasonableness. *Go-Bart Imp. Co. v. United States*, 1930, 282 UU.S. 344, 357.

Mr. Justice Black groped with a definition in *Green v. United States*, 1957, 356 U.S. 165, 197: "Reasonable," he wrote, "that irrepressible, vague and delusive standard which at times threatens to engulf the entire law, including the Constitution itself, in a sea of judicial discretion."

Have the Appellees won only the right to relitigate the reasonableness of a new set of filing fees every time the Texas Legislature convenes? Mr. Justice Brandeis had a word of warning: "Do not pin too much faith in legislation. Remedial institutions are apt to fall under the control of the enemy and to become instruments of oppression." *Mason, Brandeis*, p. 585.

Judge Homer Thornberry, in *United States v. Texas, supra*, p. 254, declared: "If the State of Texas placed a tax on the right to speak at the rate of one dollar and seventy-five cents per year, no court would hesitate to strike it down as a blatant infringement of the freedom of speech. Yet the poll tax as enforced in Texas is a tax on the equally important right to vote."

The Supreme Court of the United States has dealt with attempts to license or tax fundamental constitutional rights. In *Grosjean v. American Press Co., supra*, a tax on gross receipts of newspapers was found

to be an abridgement of the freedom of the press. An ordinance requiring a permit to distribute handbills was held invalid on its face, in *Lovell v. City of Griffin, supra*, for the same reason. And in *Murdock v. Pennsylvania, supra*, an ordinance requiring the payment of a license tax as a precondition to the pursuit of certain religious activities was stricken down as a denial of First Amendment rights. In answer to the contention made in *Murdock* that "the fact that the license tax can suppress or control this activity is unimportant if it does not do so," the court observed: "But that is to disregard the nature of this tax. It is a license tax—a flat tax imposed on the exercise of a right granted by the Bill of Rights. *A State may not impose a charge for the enjoyment of a right granted by the federal constitution.*"

The right to seek public office, as well as the right to vote, is a fundamental constitutional right. *Jenness v. Little, supra; Thomas v. Mims, supra;* and *Stapleton v. Clerk, supra.*

We cannot give some constitutional rights a preferred position without relegating others to a deferred position. *Brinegar v. United States*, 1949, 338 U.S. 160, 180.

If the State of Texas cannot require a license fee of one dollar and seventy-five cents on the right to speak, or publish a newspaper, or distribute handbills, or practice religion, or vote, then it certainly cannot require a "reasonable fee," however "low and narrow," as a precondition to the right to seek public office, which is "an analogue of the right to vote."

Rich or penniless, Wischkaemper's American citizenship under the Federal Constitution pledges his entire strength and even his life to the defense of Texas as a part of the United States, and his right to vote or to seek public office in any part of the land he must defend is something Texas must respect under the same instrument.

"Unless this court is willing to say that citizenship of the United States means at least this much to the citizen, then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California, supra.*

CONCLUSION

It is submitted that the questions presented by this appeal are either unsubstantial or have already been decided by this Court; and that plenary consideration by the Court is unwarranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, A. L. Crouch, one of the attorneys for the Appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14 day of May, 1971, I served a copy of the foregoing Motion to Dismiss or Affirm on the Appellants by depositing a copy in the United States mail, postage prepaid, and addressed to the attorneys of record for Appellants as follows:

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